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No. 94-286

In The
Supreme Court of the United States

October Term, 1994

FREIGHTLINER CORPORATION,
Petitioner,

vs.

BEN MYRICK AND EMILY MYRICK,
Respondents,

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

vs.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF THE INSTITUTE FOR INJURY REDUCTION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST

The Institute for Injury Reduction (IIR) is a non-profit national organization. Its members include attorneys and non-attorneys, many of whom have been involved in litigation activities because of the design and marketing of hazardous products IIR was formed in an effort to provide a continuing public service to identify defective products, advise the government and the public of the existence of these products, and take appropriate steps to eliminate these products from our marketplace. The Institute's members include individuals injured, or family members who have lost loved ones because motor vehicle manufacturers have not produced products with the State of the Art in safety performance. The Institute's members have a vital interest in the effect this decision may have on their members because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal motor vehicle safety standards, thereby resulting in the sale of vehicles which are not reasonably safe for all foreseeable accidents -- many of which are not even tested to the minimum standards established by the federal government. This situation allows motor vehicle manufacturers to ignore their common law responsibility to build and sell crashworthy vehicles, and it has resulted in injuries and deaths to thousands of Americans who should not have otherwise been injured or killed.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See, Sup. Ct. R. 37.

II. SUMMARY OF ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle performance which would provide basic and minimum safety for vehicles sold in this country. Then, the Congress authorized the establishment of a government agency (to develop and promulgate these regulations) which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the States had promulgated, and which required automobile manufacturers to only sell cars in their respective States if these vehicles were equipped with certain devices, such as front seat seatbelts. Congress was asked by some facets of the safety community advocates alike to pass legislation which would have the effect of eliminating diverse vehicle regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined as "minimum standard[s] for motor vehicle performance."[2]

As the National Transportation Safety Board reported in 1970[3]:

"The imposition of Federal Motor Vehicle

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[2] 15 U.S.C. 1391(2) (1966, 1988 & Supp. III 1991).

[3] *Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards*, Report No. NTSB HSS 70 1 (June 3, 1970), see page 4.

> Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, but it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market."

At the same time Congress was writing this legislation, courts around the country and legal scholars were applying common law principles to the issue of a motor vehicle manufacturers' duty to build vehicles which are crashworthy. Larsen v. General Motors Corporation, 397 F.2d 495 (8th Cir. 1968). See generally, Hoenig, Resolution of "Crashworthiness" Design Claims, 55 St. John's L. Rev. 633 (1981).

As a result of the contemporaneous application of the common law to motor vehicle design safety, and the promulgation of State safety legislation, the Safety Act addressed both issues. The Safety Act and its legislative history indicate that Congress did not want dual state and federal systems of administrative regulation. This was made quite clear by inclusion of a preemption provision; yet, Congress also specifically provided that the Safety Act would not undermine the common law:

> "While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. 1392(d), compliance with the federal regulations does not exempt any person from any liability under common law," 15 U.S.C. 1397(c)." Dorsey v. Honda Motor Company Ltd, 655 F. 2d 650, 654 (5th Cir. 1981).

The preemption section of the Safety Act prohibits any State or political sub-division from establishing any safety standard dissimilar to published federal standards. Virtually every federal and state appellate court has concluded that the language and intent of the preemption section cannot be read to extend to common law damage claims. Unlike the language used by Congress in other legislation, here Congress expressed its intent to effect only the conduct of States and political subdivisions, rather than juries. Myrick v. Freightliner Corporation, 13 F.2d 1516 (11th Cir. 1994); Taylor v. General Motors Corporation, 875 F.2d 816 (11th Cir. 1989); Hernandez-Gomez v. Leonardo, et al., 1994 WL 593202 (Az. Nov. 1, 1994); Gingold v. Audi-NSU-Auto Union. A.G., 567 A.2d 312 (Pa. Super. 1989) (rehearing denied).

In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the State activity which it intended to preempt, i.e., activities of State and political subdivisions. And, Congress also expressed its intent to preserve the common law by stating that compliance with federal safety standards does not exempt any person from any liability under common law. 15 U.S.C. §1397(c) (1966).

When the Eleventh Circuit revisited the question of federal preemption in this instance, it did so with a clearly defined path of analysis, which this Court provided in Cipollone vs. Liggett Group, Inc., 112 S.Ct. 2608 (1993). We disagree with the arguments of the Petitioner and its Amici, and submit that the Myrick Court correctly applied the principles of federal preemption to the Safety Act. The issue resolved below was not whether the court should address the existence of a "conflict" between state and federal law, but whether Congress provided for preemption

of the common law claims set forth by the plaintiff. It is the latter issue which was correctly decided below and should now be affirmed.

The Myrick Court correctly observed that there is no reason to study the question of implied preemption because of the obvious and expressed intention of Congress in disavowing any intent to preempt common law claims. The Myrick Court properly found that the "conflict analysis" of federal preemption should not be employed because it is only applicable when a Court is obliged to resort to principles of implied preemption. As this Court stated quite emphatically, when Congress has considered the issue of preemption, one should discern the scope of preemption from the precise provisions within the legislation. Here, the host of decisional law, which preceded Myrick and applied implied preemption/conflict analysis to the issue at hand, was obviously in error. Representing a growing minority, the Arizona Supreme Court succinctly summarized how courts including the Eleventh Circuit Court of Appeals have viewed the teachings of Cipollone,[4] and addressed the defense of preemption to common law claims:

> "In the wake of Cipollone, courts have narrowed their evaluation of a statute's preemptive reach. Almost all of the federal circuits have addressed federal preemption since Cipollone and now consider expression of preemption in a statute's text the 'reliable indicium of congressional intent,' no longer divining implied preemption."

While Myrick did not address the same federal motor vehicle standard which the Arizona Supreme Court

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[4] Hernandez-Gomez v. Leonardo, supra. at 14-15.

considered (FMVSS 208), it is quite apparent that the rationale followed in Myrick has application to the question of an injured party's right to bring a tort action against a manufacturer under a whole host of circumstances where the manufacturer may argue that compliance with an applicable safety regulation is tantamount to immunity from suit. It is this concern, which has prompted this Amicus to file this brief urging the Court to affirm the decision of the court of appeals; and, we ask the Court to establish for all litigants the clear proposition that because Congress never intended to preempt any common law remedy for defective design and manufacture, courts cannot impose their will upon injured consumers and preempt these claims -- despite a manufacturer's satisfaction of the minimum safety regulations.

Contrary to the protestations of the Amici for the Petitioner, including specifically the American Automobile Manufacturers Association, and its international counterpart, the decisional law which has preempted defective seat belt claims and "no airbag" claims is in error. There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to satisfy a very basic level of crash safety; allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in crash safety does not conflict with the Safety Act, and it can only **promote** improvements in design protection. The issue of design defect in relation to the question of compliance with a standard such as FMVSS 208 is not whether "[e]very person injured in every accident could claim that a different FMVSS 208 option should have been chosen in her car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal" (Brief of Amici Automotive Manufacturers, p. 5), but rather it is whether Congress expressly intended to shield these

manufacturers from tort liability when they do no more for safety than the bear minimum required by NHTSA. We think the answer to this question is quite clear: there is no immunity from common law liability for mere compliance with minimum safety regulations.

III. ARGUMENT

A. Background

Nearly thirty years ago, the publication of Ralph Nader's Unsafe at Any Speed (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, to pass the Safety Act of 1966. In the intervening years, as motor vehicle design defect litigation has grown, the manufacturers have consistently argued to courts that when their vehicles have complied with applicable federal motor vehicle safety standards, they cannot be held liable for failing to do more. And, equally consistently, courts have rejected this argument. They have uniformly stated that Congress meant what it said in 15 U.S.C. §1397(c): "[c]ompliance with any federal motor vehicle safety standard does not exempt any person from any liability under common law". Larsen v. General Motors Corporation, supra; Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992).

The application of the common law to the field of automotive safety has, therefore, borne actions at common law for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety devices, such as air bag systems. See,

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 35, 50 (1980) ("[T]he automobile industry waged the regulatory equivalent of war against the airbag". . . [even though]". . . passive restraint could prevent approximately 12,000 deaths and 100,000 serious injuries annually"). Yet, during the past several years, the manufacturers have had success in convincing many courts that they should still not be held accountable for failing to install these safety systems in motor vehicles. Strangely, until this Court's decision in Cipollone, many courts "bought into" the argument of preemption advanced by the manufacturers. Only a few stalwart judicial defenders of Congress' obvious intent in the passage of the Safety Act were brave enough to "say no" to the rationale employed by many courts to preempt claims which Congress never intended to preempt. Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa. Super. 1989); Loulos v. Dick Smith Ford, 882 S.W. 2d 149 (Mo. Ct. App. 1994); Hernandez-Gomez v. Leonardo, supra. In the application of preemption, the four Federal Circuits to address the manufacturers' preemption argument in "no-airbag" cases prior to Cipollone held that 15 U.S.C. §§1392(d) and 1397(c) precluded a finding of "express" preemption, but they each went on to hold that the manufacturers were "impliedly" exempted from liability under common law solely because they complied with Federal Motor Vehicle Safety Standard 208--which permitted, but did not require, them to install passive restraints in motor vehicles. Taylor v. General Motors Corp., 875 F. 2d 816 (11th Cir. 1989), cert. den., 110 S. Ct. 1781 (1990), rev'd in part, Myrick, supra; Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. den., 110 S. Ct. 1781 (1990); Pokorny v. Ford Motor Company, 902 F.2d 1116 (3rd Cir. 1992); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), cert. den., 110 S. Ct. 1781 (1990). It was at this juncture in the "evolution" of the preemption

analysis of the Safety Act that this Court issued its opinion in Cipollone, which then prompted a reevaluation of the application of "implied preemption" to common law actions predicated upon the failure to design a crashworthy vehicle despite compliance with federal minimum safety standards.

B. The Safety Act Says There is No Preemption.

First, there is no explicit language in the Act which expresses an intention to preempt state common law, but there is a clear and explicit statement that nothing in this legislation is intended to preempt the plaintiff's claim. Second, Congress has never created a "comprehensive federal regulatory scheme" which establishes that regulation of all facets of the automotive industry is a matter particularly within the federal system. Third, and of equal importance to this case, there is clearly no conflict which arises where "compliance with both federal and state regulations is a physical impossibility", or where permitting a common law cause of action against an automotive manufacturer of the nature filed by plaintiff will stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". As to this latter point, it is the clear and stated purpose of Congress in enacting this legislation to protect consumers, rather than manufacturers. Further, the regulations in question merely set minimum performance standards; they do not establish a design criteria, nor provide for the construction of a non-defective vehicle.

On September 9, 1966, the United States Congress enacted the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. The declared purpose of the Act was to establish safety standards

> ". . . to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. 15 U.S.C. §1381.[5]

The Act defines "motor vehicle safety standards" as

> ". . . a minimum standard for motor vehicle performance or motor vehicle equipment performance . . . 15 U.S.C. §1391(2).

In an effort to establish minimum standards applicable to all vehicles, the Act provides that neither State government's nor political subdivisions of a State may establish safety standards (i.e., regulations) which are dissimilar to the federal standards. 15 U.S.C. §1392(d) (amended 1982).[6]

Congress decided that States (defined in "the Act" as

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[5] The Senate Report on the Act sadly observed that there was disturbing evidence of the automobile industry's "chronic subordination of safety design to promotional styling, and that these manufacturers have adopted the attitude that safety doesn't sell". See 2 U.S. Cong. & Admin. News. 66-55, p. 2710.

[6] Since the Act specifies that the standards issued by NHTSA will provide minimum performance requirements, it was probably unnecessary for Congress to include a savings clause for tort liability. By providing a minimum standard Congress foresaw that common law claims would seek to impose a higher duty of care upon the automobile industry. See, Chrysler Corporation v. Dept. of Transp., 472 F.2d 659, 670 (6th Cir. 1972); Sours v. General Motors Corporation, 717 F.2d 1518 (6th Cir. 1983); Federal Consumer Safety Legislation, Heffron, et al., 1970 pp. 22-23 (Common law can hold manufacturers liable for failing to exceed the federal minimum safety standards).

the several States, District of Columbia, Puerto Rico, Guam, the Virgin Islands, the Canal Zone and American Samoa -- 15 U.S.C. §1391(8)) should avoid issuing standards dissimilar to existing federal standards; allowing State governments to enact their own regulations would cause problems pertaining to enforcement and application. 2 U.S. Cong. & Admin. News. 66-55, p. 2720.[7] Congress stressed that these minimum standards were not intended to shield manufacturers from common law liability.

> "It is intended, and this subsection [108(c)] specifically establishes, that compliance with safety standards is not a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability." House Committee Report No. 1776, p.24.

See also, 3 U.S. Cong. & Admin. News. 82-36, p. 3173. As early as 1969, the First Circuit Court of Appeals

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[7] The legislative history of the Act makes it evident that Congress could not have been referring to injury verdicts in personal injury actions. Senator Magnuson noted that "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold . . . in interstate commerce is today subject to only the standards produced by the committees of the Society of Automotive Engineers." 112 Cong. Rec. 14221 (1966) (emphasis added). And Senator Mackay noted that one of the elements of the new federal role in automobile safety was "the definition and enforcement of national safety performance standards for all motor vehicles. Fifty State legislatures simply (emphasis added). See also, Edgar v. Fred Jones Lincoln-Mercury, etc., 524 F.2d 1962, 165 (10th Cir. 1975).

confirmed Congress' intent to only limit states from enacting inconsistent regulations.

> ". . . Section 103(d) of the act, 15 U.S.C. §1392(d) squarely confronts the question before us - the scope of federal preemption of the state motor vehicle safety standards. Reduced to its simplest terms, the import of §103(d) is that, except in the case of vehicles purchased for their own use, the states are precluded from enacting non-identical standards where there is a federal standard relating to the same aspect of performance in existence." Chrysler Corp. v. Rhodes, 416 F.2d 319, 321 (Emphasis added)

The common law is free to require more than the minimum safety provided by these standards. This conclusion was made perfectly clear in the very first case deciding that NHTSA has the authority to issue a minimum standard for restraint systems. Chrysler Corporation v. Dept. of Transportation, 472 F.2d 659 (6th Cir. 1972). Once this type of standard becomes effective, the

> ". . . validity of that standard is capable of being placed in issue in litigation in any of a number of ways." 472 F.2d at 670.
>
> "[W]e note that 15 U.S.C. §1397(c) expressly preserves all common law liability with respect to compliance with any Federal motor vehicle safety standard. . . . [C]ompliance with Federal standards is not a defense to a product's liability action for failure to use reasonable care in design. . ." 472 F.2d at 670 n.13. (Emphasis added)

Federal standards do not presume to lay down a template for proper design. Sours v. General Motors Corporation, 717 F.2d 1511, 1518 (6th Cir. 1983). The purpose of §1397(c) was to disclaim any intent to preempt state common law in the automotive design area. Dorsey v. Honda Motor Company, Ltd., 655 F.2d 650, 654, 656 (5th Cir. 1981). There is a drastic difference between the preemption clause (§1392(d)) establishing standards which State and local governments cannot override, and the savings clause (§1397(c)) preserving an injured parties' common law tort remedies regardless of the promulgation of federal standards. See Knippen v. Ford Motor Company, 546 F.2d 993, 1000 (D.C. Cir. 1976); United States v. General Motors Corp., 518 F.2d 420, 434 (D.C. Cir. 1975).

When it enacted the Safety Act, Congress was fully aware that it was legislating in an area previously governed only by state law. For that reason, Congress explicitly addressed what it did and did not intend to preempt in two separate sections of the Act. The first section, 15 U.S.C. §1392(d), **which is labelled the "Preemption section"** explained the preemptive effect that Congress intended the federal motor vehicle safety standards to have on state and local safety standards. The portion relevant to this appeal provides as follows:

> "Section 1392(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment for any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the

> Federal standard."

Congress, however, did not stop with §1392(d). It added 15 U.S.C. §1397(c), which **expressly** stated the effect that Congress intended the federal motor vehicle safety standards to have on common law claims. This section provides in its entirety as follows:

> "Continuation of common law liability
>
> Section 1397(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

Given the unequivocal language of these two sections, Congress's intent is clear. Section 1392(d) preempts state and local standards, and §1397(c) expressly preserves all common law claims. Section 1392(d) has nothing to do with common law claims; it applies to "state standards." Common law claims are not preempted.

Normally, the plain and unequivocal language of 15 U.S.C. §1397 would preclude further analysis. See, e.g., TVA v. Hill, 437 U.S. 153, 184 N.29 (1984). But, if one looks to the Acts's legislative history, it only confirms this interpretation.

C. The Legislative History Shows There Is No Preemption.

The Senate's version of the proposed Safety Act did not contain §1397(c), but did contain §1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. It stated:

"The Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."
S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

This was not good enough for the House of Representatives, and so it added §1397(c). If the simple words of that section leave any doubts as to Congress's **express** intent to preserve all common law claims, those doubts are surely resolved by the House Committee Report:

"Common law liability - §108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any Federal motor vehicles safety standard does not exempt a person from any liability under common law.

It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24(1966).

Finally, what prompted the House of Representatives to insert §1397(c), and make Congress's intent to preserve all common law claims undeniably clear, was the Congressional testimony of Tim Triplett. He said:

"We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the

manufacturer of his natural responsibility for the performance of his product.

You many think that the manufacturer is afraid of Government regulations but the cry you are hearing may be "Briar Fox, please don't throw me in the briar patch." If the government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets the Government standards," and an already compounded problem will be recompounded. "Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearing"), 89th Cong. 2d Sess. Part 2, 1249 (1966).

The legislative history of the Safety Act demonstrates that, in the words of Silkwood v. Kerr-McGee Corp., 64 U.S. 238, 264, (1984) (Dissenting Opinion): "Congress intended to rely solely on federal expertise in setting safety standards, and rely on . . . juries to remedy whatever injury takes place". Even though there may be "tension between the conclusion that safety regulation is the exclusive concern of federal law and the conclusion that a State may nevertheless award damages based on its own law of liability" (Id. at 256), Congress did not believe it was inconsistent to vest NHTSA with regulatory authority to enact motor vehicle performance standards, while at the same time allowing plaintiffs to recover for injuries caused by defective motor vehicle design. Cf., Id., at 256 and

Because "the purpose of Congress is the ultimate touchstone of the preemption inquiry," California Federal Savings and Loan Association v. Guerra, 479 U. S. 272, 280 (1987), whether a particular state law is preempted can only be determined by a careful review of the applicable federal statute. This was the situation confronting the Court in Guerra, in deciding whether title VII of the Civil Rights Act preempted California's pregnancy leave statute. The Court based its analysis on the express language that Congress used in the preemption provision (or, as Justice Scalia described them, "anti-preemption provisions". As Justice Marshall explained for the majority, "there is no need to infer congressional intent to preempt state laws" because Congress stated its intention in two separate parts of the Civil Rights Act. Id. at 280. Similarly, in California Coastal Commission v. Granite Rock Company, 107 S. Ct. 1419 (1987), the Court refused to embark on an implied preemption analysis to interpret the Coastal Zone Management Act. Justice O'Connor wrote for the Court, 107 S. Ct. at 1430-31:

> "Congress has provided several clear statements of its intent regarding the preemptive effect of the CZMA; those statements which indicate that Congress clearly intended CZMA not to be an independent cause of pre-emption except in cases of actual conflict, end our inquiry . . . Because Congress specifically disclaimed any intention to preempt pre-existing state authority in the CZMA, we conclude that even if all federal lands are excluded from the CZMA definition of 'coastal zone', the CZMA does not automatically preempt all

state regulation of activities on federal lands."

This refusal to wander into the speculative waters of implied preemption makes eminent sense. If, as is universally recognized, the issue of preemption is always one of congressional intent, then the question of what is preempted on a given subject is found in the statute. It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as it did here in 15 U.S.C. §§1392(d) and 1397(c), expressly addressing what it did and did not intend to preempt. Such unnecessary quests for "congressional intent" cause courts to engage in the kind of speculative balancing of interests which they claim Congress engaged in, but somehow left out of the preemption portion of the statute. Such a process inevitably thrusts courts into a quasi-legislative role, a function for which there is no justification when Congress has spoken on the subject. In the Safety Act, Congress plainly and expressly stated its intent to preserve common law claims. That being so, they cannot be impliedly preempted. Loulos v. Ford Motor Company, supra.

D. Cipollone and the Safety Act's Express Preservation of Common Law Claims Precludes a Finding of Express Preemption and Any Implied Preemption Analysis.

This Court in Cipollone prescribed that the preemptive scope of federal legislation is governed by the express language contained in a preemption clause -- when one is written by Congress. In reviewing the effect of Congress preempting State warning requirements and the

continued vitality of State common law damages actions, the Court observed that there is no inherent conflict between these two propositions. In fact, the Court implicitly acknowledged the propriety of allowing both (through legislative fiat or judicial analysis) by referencing legislative provisions of the Comprehensive Smokeless Tobacco Health Education Act of 1986; that Act contained both a preemption section (of State or local regulations prohibiting or imposing upon manufacturers the obligation to include statements about smokeless tobacco products and health) and a Savings Clause for common law action.

Given the unequivocal language of the Savings Clause in the Motor Vehicle Safety Act of 1966, and this Court's insistence on reviewing Congress' language closely for analysis of what is and what is not preempted by federal legislation, the existence of 15 U.S.C. §1397(c) is determinative. A direct analogy between the rationale in Cipollone and the legislation under review here demonstrates the validity of our position.

The 1965 Cigarette Act preemption provision stated: "No statement relating to smoking and health shall be required in the advertising of cigarettes." It was observed that this provision prohibited state and federal rule-making bodies from mandating particular cautionary statements. Cipollone, 112 S. Ct. 2619. The Court observed that this reading of the preemptive statement in the Act was confirmed by looking at the statement of purpose of the 1965 Act -- i.e., to avoid diverse, nonuniform and confusing labeling and advertising regulations. For these reasons, the Court ruled that the preemption provisions of the 1965 Act only preempted state and federal rule making bodies from prescribing certain cautionary statements, and it did not preempt common law damage actions. Cipollone, Id.

As we, and almost every court which has studied the 1966 Motor Vehicle Safety Act has observed, the preemption clause of the Safety Act confirms Congress' intent to provide for the avoidance of State and political sub-division government rule making bodies from mandating vehicle performance standards not identical to the federal standards. In neither the 1965 Cigarette Act nor the 1966 Safety Act is there any express provision to preempt common law damage claims related to negligent warning (of Cigarette use risks) or design defect or negligent design of motor vehicles. Because these two pieces of federal legislation so closely mirror each other in their verbiage and intent, the conclusion that common law actions are not preempted for one should equally apply to the other.

E. Plaintiff's Claim Is Not Expressly Preempted Based upon Cipollone.

The Petitioner and their Amici argue that there is express preemption, and that every federal appellate court which decided that question against the automobile manufacturers before and after Cipollone is in error. Thus, they reargue the contention that common law claims are "standards" as that word is used in the "preemption" section of the Safety Act. While we would believe that mere reference to the hundreds of reported appellate court decisions previously construing this language to not include common law design claims would be enough to put this argument to rest, we will not stop there. To truly understand the express scope of preemption in the context of motor vehicle safety, this Court must look to all Congressional statements of intent. For this reason, the Missouri Court of Appeals recently rejected preemption and, relying in part on the decision of the Eleventh Circuit Court of Appeals in Myrick, stated as follows:

"'[I]n the Safety Act, Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause (1392(d)) and the other one of which we call a savings clause (1397(k)). Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not preempted.'

"This analysis is consistent with a basic rule of statutory construction that legislative intent is discerned by examining a statute's provisions as a whole. . . .

* * *

"Clearly, Congress mandated in 1397(k) that the Safety Act was not to serve as a shield to any liability under common law. . . ."

". . . We concur with the conclusion of the Myrick court that '[t]he legislative history demonstrates that the pre-emption provisions of the Safety Act, which include the savings clause, are a reliable indicium of congressional intent.'" Loulos v. Ford Motor Company, 1994 WL 226676 (May 1994).

F. Defendant's Argument that the Options of FMVSS 121 and 208 Require Implied Preemption Based on Conflict Analysis is Wrong.

Preemption is not to be inferred merely from the fact that Congress has authorized comprehensive federal

regulations of the field. New York State Dept. of Social Services v. Dubling, 93 S. Ct. 2507, 2514 (1973). Before a Court may find preemption, a sharp conflict must exist between state and federal law. If the Act itself does not expressly warrant preemption of the plaintiff's common law claim, then certainly Congress did not expect -- when it saved the common law -- the federal regulations to preempt a cause of action. See, e.g., Silkwood, supra; Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984). It is equally important to note that never in the convoluted history of regulations such as FMVSS 121 and 208 has NHTSA stated that compliance with any of the options in these regulations would preempt common law liability. As she announced her intention to encourage the "development and availability [of airbags] through appropriate incentives" (49 Fed. Reg. at 28963), Secretary Dole also noted that:

> "[a]nother potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> 'If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of the injury.'" Id. at 28972.

NHTSA's silence about preemption strongly bolsters the conclusion that FMVSS 121 and 208 were issued to provide a minimum level of performance. Cf., Chrysler Corporation

v. Rhodes, supra, 416 F.2d 323. In California Com'n v. Granite Rock Co., 107 S. Ct. 1419, 1426 (1987), the Court recounted the principle that preemption will not be imposed when federal regulations are devoid of any expression of intent to preempt.

The defendant argues that NHTSA's promulgation of options constitutes a form of federal preemption. That argument has no merit. In Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 102 S. Ct. 3014 (1984) -- the case relied upon for this argument -- there was an unequivocal expression that the federal agency intended to preempt state law by providing banks with the option to exercise due-on-sale clauses. Id. at 3025. To the contrary, in this case, neither Congress nor NHTSA has expressed any interest in displacing state common law because of the FMVSS options. It is easy to understand NHTSA's silence because federal safety standards do not set forth design standards. For instance, under FMVSS 121 and 208 NHTSA has promulgated regulations requiring at a minimum the manufacture of vehicles with one of several types of brake systems and one of several types of restraint systems, but the regulations do not dictate what safety features are required to satisfy the manufacturers' common law duty of care--i.e., FMVSS 208 does not state the manner of construction, nor does it establish what is necessary to make each vehicle safe. State law, which may impose liability upon a manufacturer for producing a defective vehicle is not, therefore (1) an identical area of regulation, nor (2) does it establish a contrary imposition or obligation upon the manufacturer.

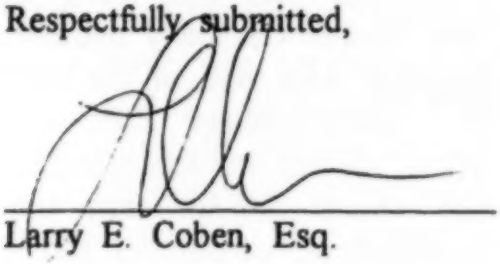
G. A Finding of Preemption Will Allow Vehicle Manufacturers to Escape Liability for Defective Products That Directly Cause Injury.

The relief requested by the Petitioner and its Amici would, undoubtedly, cloak motor vehicle manufacturers with immunity that is neither fair nor intended by the Safety Act. A few examples will, we hope, suffice. In the mid-1970s, Ford Motor Company marketed the Ford Pinto. This car complied with one of the performance options of FMVSS 301, which obliged Ford to design and manufacture the vehicle so that its fuel system would not leak in a 30 mph rear barrier impact test; the Pinto met that standard. Nevertheless, consumers had every right to challenge the design of that product when they or their loved ones became involved in a fiery crash. Likewise, every car sold in this country by American manufacturers between 1975 and 1989 complied with FMVSS 208 by installing a lap belt only system in the rear seat. That installation satisfied one of the options of the latter standard. Nevertheless, the use of a lap belt only can, under forseeable circumstances, cause catastophic injury -- which was avoidable by the installation of lap and shoulder belt systems marketed by American manufacturers in their vehicles sold in other countries during this same time period. Should manufacturers be held accountable for neglecting the design of cars in this country because they complied with bare minimum safety standards? Would such immunity further or retard the express purpose of the Safety Act? We believe the answer is very obvious. Congress never intended to immunize manufacturers from liability when it passed the Safety Act.

H. Conclusion

The Institute For Injury Reduction respectfully submits that the Court should affirm the Eleventh Circuit's decision, and put to rest the contention that Congress intended to immunize motor vehicle manufacturers from the common law because of compliance with applicable federal minimum standards. Safety depends on it.

Respectfully submitted,



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